U.S. Department of Labor

Office of Administrative Law Judges
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DATE: July 15, 1999
CASE NO.: 1998 ERA 35, and
1998 ERA 50

In the Matter of

FLOYD H. GLENN
Complainant

v.

LOCKHEED MARTIN ENERGY SYSTEMS, INC.
Respondent

Appearances: Mr. Floyd H. Glenn
Pro Se

Mr. Charles W. Van Beke, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER -
PARTIALLY GRANTING RESPONDENT'S MOTION TO DISMISS; AND,
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

ORDER CANCELING HEARING

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. 5851; the Clean Air Act ("CAA"), 42 U.S.C. 7622; the Comprehensive Environmental Response, Compensation and

Liability Act ("CERCLA"), 42 U.S.C. 9610; the Solid Waste Disposal Act ("SWDA") also known as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6971; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622; the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300J-9; and, the Federal Water Pollution Control Act ("WPC"), 33 U.S.C. § 1367 as implement by 29 C.F.R. Part 24 (effective date - March 11, 1998; see 63 Federal Register 6614, February 9, 1998). The complainant, Mr. Floyd Glenn, has filed several complaints alleging diverse acts of adverse actions by the respondent, Lockheed Martin Energy Systems, Inc. ("LMES") in retaliation for his alleged protected activities under the environmental statutes.

On March 23, 1999, respondent's counsel, Mr. Van Beke, filed two pre-hearing motions. First, Mr. Van Beke seeks dismissal of the complaints because they fail to establish jurisdiction or state a claim upon which relief may be given. Second, in the alternative, the respondent moves for a summary decision in its favor on the basis there is no genuine issue of material fact that LMES had legitimate business reasons for its actions. In support of its second motion, LMES has submitted numerous affidavits, declarations, and an extensive appendix.

Through a formal notice issued April 1, 1999, I provided Mr. Glenn over thirty days to respond to the motions. I specifically noted that since LMES' motions were supported by affidavits, declarations, and documents, the assertions in Mr. Glenn's complaints may be insufficient in the absence of any affidavits, declarations, or documents on his behalf. On May 10, 1999, I received a faxed request from Mr. Glenn for another thirty days to respond. On May 25, 1999, I granted the request and informed Mr. Glenn I would accept a response through June 25, 1999. I again reminded Mr. Glenn of the importance of supporting affidavits, declarations, and documents. To date, I have received no additional response from Mr. Glenn.

I. PROCEDURAL BACKGROUND

In May 1997, Mr. Floyd Glenn, a security officer employed by LMES at the Y-12 Nuclear Weapons Plant, filed an initial discrimination complaint which was subsequently amended with additional allegations on August 14, 1997 and September 12, 1997.[1] After an investigation by the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, the regional investigative supervisor on June 2, 1998, determined Mr. Glenn's complaints lacked merit for diverse reasons, including timeliness, failure to establish protected activities, and inability to prove an unlawful motive behind disciplinary actions. After he received a copy of the determination letter on June 23, 1998, Mr. Glenn appealed the adverse determination on June 26, 1998 and requested a hearing before the Office of Administrative Law Judges ("OALJ").[2] In OALJ, the case was designated 1998-ERA-35. On June 30, 1998, I set a hearing date of July 21, 1998. Due to various requests of the parties, I issued several continuances of the hearing. The hearing for 1998-ERA-35 is presently scheduled for July 27, 1999.

On May 27, 1998, Mr. Glenn filed another complaint of discrimination following LMES' termination of his employment as a security officer on February 27, 1998. After another OSHA investigation, the regional investigative supervisor on August 5, 1998 determined Mr. Glenn's complaint lacked merit because LMES had legitimate, non-discriminatory business reasons for terminating his employment. Mr. Glenn appealed the adverse determination on September 15,1998 and requested a hearing.[3] Upon receipt of the hearing request by OALJ, the case was designated 1998-ERA-50 and the Chief Administrative Law Judge John Vittone assigned the case to Administrative Law Judge Linda Chapman. On September 28, 1998, Judge Chapman, at the direction of Judge Vittone, transferred 1998-ERA-50 to me for consolidation with 1998- ERA-35. On October 5, 1998, I set a hearing date of November 4, 1998 for both cases. Since that time, I have issued several continuances and as previously noted, a hearing is now scheduled for July 27, 1999.

II. COMPLAINANT'S ALLEGATIONS

Mr. Glenn has presented multiple complaints containing a wide range of alleged protected activities and retaliatory adverse actions. A summary of the allegations, by complaint follows. The first three complaints are grouped under 1998-ERA-35 and the last complaint is the subject of 1998- ERA-50.

May 13, 1997 Initial Complaint (1998-ERA-35)

In 1978, shortly after being hired as a security guard at the K-25 plant, Mr. Glenn reported barrels of toxic material in a quarry were being used for target practice.[4] Some of the barrels exploded when struck by a bullet. Due to his concerns for water and air pollution and his personal safety, he questioned Captain Hughes, a supervisor, about the practice and then refused to participate. The supervisor became upset and considered Mr. Glenn's position a refusal to perform an assigned duty.

Between 1977 and 1983, Mr. Glenn reported the improper storage of special nuclear material in a facility to Captain Townsend. In response, Captain Townsend failed to take any corrective action. Instead, she assigned Mr. Glenn to undesirable night guard duty and on one occasion gave him a groundless written reprimand. Also, about 1983, Mr. Glenn reported to Captain Townsend the improper storage of classified documents in violation of U.S. Department of Energy ("DOE") regulations. Captain Townsend expressed her belief that a locked office door was sufficient security.

In 1987, as a member of a Tactical Response Control Team, Mr. Glenn operated a training weapon that did not properly expel expended shells. Mr. Glenn reported his concerns to DOE auditors. During that meeting, Mr. Evans, a senior LMES supervisor, passed a note to Mr. Lawson, the immediate supervisor of Mr. Glenn, instructing Mr. Lawson to remove Mr. Glenn from the Tactical Response Control Team if he couldn't keep quiet. Mr. Lawson did not remove Mr. Glenn from the team, but Mr. Glenn interpreted the event to mean if a person raised safety concerns, she or he could expect retaliation.

In June 1993, while assigned to a post that required the inspection of vehicles entering the Y-12 plant, Mr. Glenn utilized a device to randomly select vehicles for inspection to meet the DOE requirement that approximately 20% of the vehicles should be examined. On occasion, when the device selected several cars in a row, some LMES employees believed he was arbitrarily selecting the vehicles. These individuals reported their observations to his supervisor, Mr. Bradshaw. In response, Mr. Bradshaw reassigned Mr. Glenn to a post that didn't involve interacting with the public. The reassignment reduced his overtime pay. About the same time, Mr. Glenn believes Mr. Bradshaw overheard his attempt to reach his attorney to discuss his problems.

On March 25, 1996, Mr. Glenn reported notable security vulnerabilities, such as failure to inspect badges and vehicles at one post, to Colonel Clements. Despite numerous reports from Mr. Glenn, Colonel Clements took no action. Due to Colonel Clements' inaction, Mr. Glenn then attempted to contact a DOE official. Mr. Gibbs, an LMES manager, asked him why he needed to contact DOE. Mr. Glenn then explained his problem with Colonel Clements. Eventually, in retaliation, LMES officials harassed Mr. Glenn, accused him of misconduct, and reassigned him to an isolated post. In particular, at one meeting, Mr. Hunter presented accusations that Mr. Glenn was overbearing and rude. After Mr. Glenn informed Mr. Hunter that people had those impressions because he did his job properly and wouldn't change, Mr. Hunter told Mr. Gibbs to reassign Mr. Glenn to one post only.

On September 19, 1996, Mr. Glenn was informed that his authority to carry a weapon was suspended until he received a mental health evaluation. In October 1996, on the same day Mr. Glenn was directed to have a mental health evaluation, he was selected for a random urinalysis. Later, his security clearance was pulled, and his request to copy his personnel files was denied. Also, in September 1996 and October 1996, Mr. Glenn alleges that LMES engaged in covert monitoring of his post. He believes he was under surveillance due to his membership in an environmental group, and his serving as a speaker for the group on television.

In April 1997, following a short-term disability absence, Mr. Glenn was not re-issued his badge and received a visitor's pass instead due to the absence of a medical clearance. Eventually, in May 1997, LMES reinstated Mr. Glenn as a security officer.

August 14, 1997 Amended Complaint (1998-ERA-35)

During a May 28, 1997 meeting with supervisors concerning his contact with individuals and personal vehicles, Mr. Glenn asserted LMES was not following security regulations. On May 30, 1997, Mr. Glenn refused entry to two trucks for health and safety reasons. When he stopped the first truck, Mr. Glenn reviewed the manifest and discovered the vehicle was transporting radioactive material. However, the truck did not have placards indicating it contain radioactive material and the driver lacked a proper

permit. Mr. Glenn believed these two discrepancies were violations of DOE and U.S. Department of Transportation regulations. After consulting with supervisors, Mr. Glenn let this truck pass. Later, on the same day, Mr. Glenn stopped another truck with a manifest indicating the vehicle was carrying

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radioactive drums and crates which needed twenty-four hour surveillance. In response, Mr. Glenn called his supervisor stating he was stopping work because the truck contained radioactive materials. When another supervisor informed Mr. Glenn that the plant superintendent wanted him to let the vehicle pass, Mr. Glenn asked whether the work stoppage had been reported since such a report generates a safety investigation. When Mr. Glenn continued to refuse entry to the truck, Commander Duncan asked whether he was disobeying a direct order and noted imminent danger had to be present for a work stoppage. After speaking with a union representative, Mr. Glenn let the truck through the gate. On June 2, 1997, Mr. Glenn was informed he would be subjected to a security review by a DOE representative. Then, on June 6 and June 12, 1997, Mr. Glenn reported the two truck incidents to DOE due to security, safety and health concerns. Finally, sometime later, Mr. Glenn attended a public meeting conducted by the State of Tennessee Blue Ribbon Committee. At this meeting, Mr. Glenn told the committee about the two truck incidents. He also informed the committee that he had stopped an individual leaving the plant with a loaded weapon. LMES attorneys were present at the meeting and Mr. Glenn believes they were conducting surveillance of his activities. His comment about the weapon incident was reported in a local newspaper.

On July 9, 1997, a worker became belligerent when Mr. Glenn conducted a search of hand-carried items. Mr. Glenn states he was inappropriately disciplined for this incident. On July 11, 1997, Mr. Glenn was confronted by his supervisors concerning a complaint that he made a racially inappropriate comment to a black co-worker. Mr. Glenn believes the complaint may have been filed by a co-worker who has expressed anger about Mr. Glenn's disclosures. The co-worker believed Mr. Glenn's protected activities might result in the plant closing. Mr. Glenn believes he was being singled out because of his activities since LMES routinely tolerated inappropriate conduct by other workers. About July 24, 1997, after Mr. Glenn overheard an employee responding to a fish kill, he called the local newspaper and reported the incident. He also informed DOE and the Environmental Protection Agency and expressed his belief that either PCB or radioactive material was responsible. Finally, in July 1997, Mr. Glenn was reassigned from a good post to a position that required inspection of hand-carried items. Even after he injured his knee, LMES refused to change the assignment absent a more detail physician statement. Mr. Glenn alleges the job reassignment was used as retaliation. Eventually, he returned to good post.

In a August 1997 meeting with the DOE Inspector General, after describing an inappropriate response to a theft of property, Mr. Glenn expressed environmental concerns.

September 12, 1997 Amended Complaint (1998-ERA-35)

Mr. Glenn claims he was harassed by Commander Spradlin at a safety meeting on storm water sometime around September 1997. Also about September 1997, at a governor's Blue Ribbon Panel, Mr. Glenn disclosed LMES e-mail which encouraged suppression of information to the news media. A senior LMES manager attended this meeting. On September 8, 1997, Mr. Glenn reported a grey discharge into east fork of the Poplar Creek to the Tennessee Department of Environmental Compliance. He observed a sub-contractor of removing the sludge from an open sewer line and placing it into an adjacent storm drain. Eventually, Mr. Glenn was subjected to a hostile work environment due to the initiation of an investigation on September 9, 1997 (with potential for disciplinary action which might lead

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to employment termination) for an incident concerning a DOE employee and his note-taking activity near a LMES building. Later, Mr. Glenn was questioned by LMES personnel about the grey sludge report and his failure to report the discharge directly to LMES management. Throughout 1997, Mr. Glenn continued to receive disparaging remarks by co-workers and supervisors for his effort to document and report his concerns.

May 27, 1998 Final Complaint (1998-ERA-50)

In December 1997, Mr. Glenn was harassed by Commander Brandon during a meeting about an allegation Mr. Glenn had disobeyed a lawful order. Mr. Glenn then took a vacation for most December 1997. When he returned in January 1998, Mr. Glenn was informally disciplined for disobeying an order.

On February 2, 1998 Mr. Glenn presented a list of security vulnerabilities and concerns to a DOE assessment team. About two weeks later, Commander Brandon attempted to discuss these incidents with Mr. Glenn. Mr. Glenn informed Commander Brandon that he intended to discuss the matter only with DOE personnel. Commander Brandon indicated Mr. Glenn may face disciplinary action for failing to properly report security violations. On February 9, 1998, Mr. Glenn reported to the Tennessee Department of Environmental Conservation a possible environmental violation relating to the release of chlorinated water into the East Fork Popular Creek.

Sometime in February 1998, Mr. Glenn was required to participate in a re- enactment of seat belt enforcement incident. Mr. Glenn believes the sole purpose of the exercise was to get him into trouble. As preparation for the event, Mr. Glenn attempted to obtain a copy of the seat belt enforcement procedures. However, Colonel Hunter rudely appeared and essentially prevented his access to the copy. Mr. Glenn states this exchange is evidence of Colonel Hunter's "deep seated animus" against him.

In late February 1998, Mr. Glenn prepared a written declaration for another whistleblower complainant indicating that person had not encouraged Mr. Glenn to make reports outside LMES channels. Mr. Glenn also stated Director Clements had created a "chilled" atmosphere and indicated the company engaged in retaliation. Somehow, a copy of this declaration ended up in a supervisor's basket.

On February 24, 1998, Mr. Glenn submitted another report to Tennessee Department of Environmental Conservation stating that a barrel containing mercury contaminated soil had been discovered in the East Fork Popular Creek.

When Mr. Glenn asked for time off to attend a funeral, LMES management did not inquire about his relationship to the deceased. Instead, Mr. Glenn believes they approved paid funeral leave with the intention of later "attacking" Mr. Glenn.

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On February 27, 1998, LMES Protective Force Director Clements informed Mr. Glenn that his employment was being terminated. The stated basis for the action was his continued harassment of employees during seat belt use enforcement and time fraud and misrepresentation in connection with funeral leave. Mr. Glenn alleges the termination action represented reprisal for his protected activities. He pointed out that the harassment complaints were not filed until several weeks after the alleged incidents. Mr. Glenn also attended the funeral due to concern for his children.

III. DISMISSAL FOR FAILURE TO STATE A CLAIM[5]

Because neither 29 C.F.R. Part 24 (whistleblower proceedings) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim, the standards set out in the Federal Rules of Civil Procedure are applicable. *Freels v. Lockheed Martin Energy Sys.*, 95-CAA-2, 94-ERA-6, page 10 (ARB December 4, 1996). Under Federal Rule of Civil Procedure 12 (b) (6),dismissal may be appropriated if the facts in the case fail to state a claim. In considering whether dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. A dismissal in this situation is based solely on the legal insufficiency of the complainant's case. In other words, even is the complainant could prove all of his factual allegations, he would not prevail. See *Varnadore v. Oak Ridge National Laboratory,* 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, and 95-ERA-1 (ARB June 14, 1996), slip op., p. 36; *aff'd Vanadore v. Secretary of Labor, et al*, 141 F.3d 625 (6th Cir. 1998). On the other hand, a dismissal for failure to state a claim should not be granted according to the U.S. Court of Appeals for the Sixth Circuit "if the factual allegations of the complaint, after having been accepted as true and construed most favorably on behalf of the plaintiffs, present a cognizable claim if proved by the preponderance of the evidence." *Jones v. City of Lakeland, Tennessee*, 175 F.3d 410 (6th Cir. (Tenn.) 1999).

In determining whether Mr. Glenn's the numerous employee protection violation allegations in his four complaints present cognizable claims, several principles relating to whistleblower claims are applicable.

A. Elements and Burden of Proof

In an environmental whistle blower case the complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; (3) the respondent was aware of the protected activity when it took the adverse action; and, (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action.[6] *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

Turning to the first element of the *prima facie* case, the Secretary, U.S. Department of Labor, has broadly defined a protected activity as a report of an act which the complainant

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reasonably believes is a violation of the environmental acts.[7] While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co*., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. In other words, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v Westinghouse Hanford Co*., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Finally, an internal environmental complaint is covered under the employee protection provisions of the environmental statutes. *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y Mar. 24, 1995). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her environmental concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc*., 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand).[8] The report may be made to a supervisor, or through an internal complaint or quality control system, or to an environmental staff member. *Williams v TIW Fabrication & Machining, Inc.* 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp*., 85-ERA-34 (Sec'y Sept. 28, 1993); and*, Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

The second element involves the determination of an adverse action. Actions with respect to an employee's compensation, terms, condition, or privileges of employment are

covered under the environmental employee protection provisions and may be considered adverse actions. *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y May 18, 1994) citing *DeFord v. Secretary of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983).

Under the third element, to hold the respondent responsible for knowledge of the complaint, the complaint is not required to articulate each statute and regulations that allegedly has been violated. *Jones v. E G & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept 29, 1998). Instead, the complaint should contain sufficient information to reasonably place a person on notice of the environmental concern.

To prevail on the fourth element of the *prima facie* case, a complainant only needs to establish a reasonable inference that his or her protected activity lead to, or caused, the respondent's adverse action. This burden to show an inference of unlawful discrimination is not onerous. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). At this point of the process, the complainant need only present evidence sufficient to prevail until contradicted and overcome by other evidence. *Jackson v. The Comfort Inn, Downtown*, 93-CAA-7 (Sec'y Mar. 16, 1995), citing *Carroll v. Bechtel Power Corp.,* 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11. In that regard, the Secretary has noted that one factor to consider is the

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temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Close temporal proximity may be legally sufficient to establish the causation, the fourth element, of the *prima facie* case. *Conway v. Valvoline Instant Oil Change, Inc.,* 91-SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7) to about one year (*Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec'y Sept. 17,1993).

On the other hand, just as temporal proximity may be a factor in showing an inference of causation, the lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System,* 95-ERA-52 (ARB Jul. 30, 1996), citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995). If a significant period of time lapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.,* 87-ERA-27 (Sec'y Jan. 6, 1992), slip op. at 8-9.

If the complainant presents a *prima facie* case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken

the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989).

If the respondent does present evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by the preponderance of the evidence, can establish the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet that burden by showing the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. See *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996)*; Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co.,* 80-ERA-2 (Sec'y Apr. 25, 1983).

One final observation on the last step of determining the actual motive for the adverse action. Even though acts of adverse action have been found untimely for the purposes of filing a complaint, they may nevertheless be relevant background evidence that illuminates present behavior concerning a non- timed barred adverse action. *Malhotra v. Cotter & Co.*, 885 F.2 1305, 1310 (7th Cir. 1991).

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B. Timeliness

The employee protection provision of the ERA states a complainant shall file a complaint within 180 days of a discriminatory action. 42 U.S.C. § 5851 (b) (1). All the other environmental statutes in this case have a 30-day complaint filing limitation. For example, see 42 U.S.C. § 7622 (b) (1) (CAA). Under certain circumstances, these complaint filing limitations may be waived based on an equitable tolling of the filing requirement and the concept of a continuing violation.

Equitable Tolling

Because the thirty day time limit is not jurisdictional, it may be subject to equitable tolling. *Doyle v. Alabama Power Co.*, 87-ERA-43 (Sec'y Sept. 29, 1989), *aff'd sub. nom. Doyle v. Secretary of Labor,* No. 89-7863 (11th Cir. 1989). A tolling of the filing time limitation may be appropriate if: (1) the respondent mislead the complainant concerning the cause of action (by fraudulently concealing its actions, *Hill v. U.S. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995)); (2) some extraordinary circumstance prevented a timely assertion (such as a stroke, *Central States, Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1376 (7th Cir. 1992)); or, (3) the complainant timely raised the precise statutory claim but in the wrong forum. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).[9] In regards to the last basis, the United States Supreme Court has held that utilization of collective bargaining grievance procedures does not justify tolling a statutory filing period.

Electrical Workers v. Robbins & Myers, Inc. 429 U.S. 229 (1976), cited in *Allentown,* 657 F.2d at 19. In addition, if a complaint is filed in a wrong forum, it still must be accomplished within the required time frame. *Allentown*, 657 F.2d at 20, relying on *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965). On the other hand, equitable tolling is not appropriate because a complaint may not have been aware of the specific time permitted under the statutes for filing a complaint. *Allentown,* 657 F.2d at 21 (ignorance of employee protection provisions of the Toxic Substance Control Act did not toll the filing time limit), and *Kang v. Department of Veterans Affairs Medical Center*, 92-ERA-31 (Sec'y Feb. 14, 1994).

Continuing Violation

A second equitable exception to the complaint filing time limits occurs if the complainant is subjected to either a continuing violation or a systematic pattern of discrimination. The justification for this exception is the adverse employment practice becomes apparent only with the passage of time. Paraphrasing the court in *Malhotra*, 885 F.2d at 1310, it would be unreasonable to require a complainant to realize he or she is a victim of discrimination if such discrimination doesn't become apparent until a pattern of discriminatory mistreatment develops.[10] If a continuing violation situation exists and the complaint is filed within thirty days of the last act in the continuing series of events, then that one non-time barred act can save the other previous acts which are time barred. *Varnadore v. Secretary of Labor*, Nos. 96-3888/4389 (6th Cir. Apr. 6, 1998) (case below 92-CAA-2 *et al.*)[11] In addition, a systematic, or company-wide, pattern of discrimination may also toll the time limit on the same continuing violation basis. To obtain

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equitable relief under on this theory, a complainant would have to establish the respondent's policy of discrimination against a group of employees. *Green v. Los Angeles City. Superintendent of Sch.,* 883 F.2d 1472, 1480-1481 (9th Cir. 1989).

In considering a continuing violations case, the court in *Berry v. Bd. of Supervisors of LSU,* 715 F.2d 971, 979 (5th Cir. 1983), *cert. denied,* 479 U.S. 868 (1986) noted that the theoretical bases for, and the parameters of, the continuing violation theory are "unclear." However, as a guide, the court presented three questions to be considered in determining whether a series of acts constitute a continuing violation. In subsequent decisions, the Secretary of Labor has adopted this framework. First, are the acts similar in nature, involving the same type of discrimination which tends to connect them together? *Berry*, 715 F.2d at 981. The Secretary has determined that a set of isolated, permanent decisions involving disparate facts, such as non-selection for a position, denial of overtime, and failure to re-assign, does not amount to a continuing violation. *Gillian v. Tennessee Valley Authority,* 92 ERA-46 and 50 (Sec'y Apr. 20, 1995). On the other hand, when denial of a promotion, re-assignment, and suspension of certification all related to a common subject matter of cross-training, these acts constituted a continuing violation. *Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec'y Sept. 17, 1993). If an employee

faces a series of imposed employment restrictions, such as work re-assignment, isolation from co-workers, and different qualification standards, which adversely affect his or her ability to advance, such a pattern of discrimination may warrant tolling the statute of limitations. *Simmons v. Arizona Public Service Co.*, 93-ERA-5 (Sec'y May 9, 1995).

As a second consideration, the court suggested the following query: are the acts recurring, such as a bi-weekly event, rather than isolated work assignments or employment decisions? *Berry* 715 F.2d at 981. When confronted with recurring discrimination, a complainant will not be required to file suit when initial discrimination occurs. *Roberts v. North American Rockwell, Corp.*, 650 F.2d 823 (6th Cir. 1981). At the same time, the courts and usually the Secretary will not permit a continuing violation tolling of the statute of limitations on the basis that there are natural and continuing effects of a consummated act. *Ballentine v. Tennessee Valley Authority,* 91-ERA-23 (Sec'y Sept. 23, 1992); and, *Howard v. Tennessee Valley Authority*, 90-ERA-24 (Sec'y Jul. 3, 1991) *aff'd sub nom. Howard v. United States Department of Labor*, 959 F.2d 234 (6th Cir. 1992). For example, even though a demotion will have the continuing effect of reduced pay, the thirty day complaint requirement usually may not be tolled because the loss of pay continues. *English v. General Electric Co.,* 85-ERA-2 (Sec'y Feb. 13, 1992) and *Bassett v. Niagara Mohawk Power Co.* 86-ERA-2 (Sec'y Sept. 28, 1993). Compare, *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Jul. 26, 1995) (demotion accompanied by loss of pay is a continuing violation). Just alleging that several acts create a hostile work environment is not sufficient if the acts are isolated employment decisions, lack common subject matter, and are not the same type of discrimination. *Holtzclaw v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*., 95-CAA-7 (ARB Feb. 13, 1997). In such a case, each discrete act of discrimination will begin its own thirty day clock for filing a complaint. *London v. Cooper & Lybrand*, 644 F.2d 811, 816 (9th Cir. 1991).

The U.S. Court of Appeals for the Fifth Circuit believed the third question in the continuing violation analysis was the most important. Do the individual acts lack a permanent nature which would have triggered the complainant's awareness of, and the duty to, assert his or her rights? *Berry*, 715 F.2d at 981. This degree of permanence should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. *Nathaniel v. Westinghouse Hanford Co.,* 91-SWD-2 (Sec'y Feb. 1, 1995), quoting the *Berry* decision. If an employee is reasonably aware of an adverse action that needs no additional discriminatory intent to continue, then the employee is expected to comply with the statutory time limit for filing a complaint.

Discussion

May 13, 1997 Complaint.

Evaluating the various incidents in this complaint in light of the elements of proof for a whistleblower claim, I find, with one exception described below, that the events Mr. Glenn described in this complaint fail to state a whistleblower claim. Starting with the 1978 target barrel activity, I note that while Mr. Glenn's report of using toxic material barrels for target practice may be considered a protected activity, the only contemporaneous reaction from LMES was Captain Hughes' irritation. The next reported adverse personnel actions between 1977 and 1983 involved a different supervisor, Captain Townsend, and were based on a different, unrelated incident. As a result, the complaint fails to establish Mr. Glenn was subject to an adverse action for his barrel report.

Mr. Glenn's reports of improper storage of classified documents, a malfunctioning training weapon, and security vulnerabilities associated with badge and vehicle inspections do not directly involve environmental or nuclear safety concerns, or even raise a reasonable inference that his reports "touch on" environmental problems. Mr. Glenn did not state a violation that would reasonably fall under the environmental statutes. None of these reports were protected activities. Likewise, the complaint does not establish that his status as a spokesperson for, and a member of, an environmental group were protected activities under the various environmental statutes.

The one incident in this complaint that does meet the requirements of a whistleblower claim is Mr. Glenn's internal reporting to Captain Townsend of improper storage of special nuclear material between 1977 and 1983. That action would be considered a protected activity. His subsequent reassignment to an undesirable duty by Captain Townsend is an adverse action. And, the reassignment was close in time to his reports so an inference of retaliation is raised.

Although this last event does have the elements of *prima facie* case, I find it still fails to state a claim because the complaint is untimely. Mr. Glenn did not file a complaint about Captain Townsend's 1983 reassignment action until sixteen years later. The complaint does not present a factual situation that warrants equitable tolling of the time filing requirement. In addition, a continuing violation exception is not applicable. Captain Townsend's decision was clearly a final, isolated employer

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decision. There is not a reasonable inference that the adverse actions from 1993 through his termination in February 1998 were part of a continuing violation of the environment employee protection statutes that started with the 1983 reassignment action.

For the reasons stated above, the May 17, 1997 complaint does not present sufficient facts that may lead to a successful whistleblower claim. Accordingly, the May 17, 1997 complaint must be **DISMISSED** for failure to state a claim on which relief may be given. The Motion to Dismiss in regards to the May 13, 1997 complaint is **GRANTED**.

August 14, 1997 Amended Complaint

This complaint involves five reported incidents. The first incident in May 1997 was not a protected activity. The complaint does not state how Mr. Glenn's assertion to supervisors in May 1997 that LMES was not following security regulations related to the environment. This portion of the complaint does not describe a protected activity. Likewise, Mr. Glenn's public disclosure that he had stopped an individual with a loaded weapon is not a protected activity under the environmental statutes.

On the other hand, Mr. Glenn's internal and external reports of improper procedures and surveillance during the May 30, 1997 transportation of radioactive material by truck were protected activities. LMES supervisors were aware of Mr. Glenn's concerns. And within a month and a half, Mr. Glenn experienced several adverse personnel actions including counseling and reassignment to an undesirable post. Based on the proximity of these personnel actions to his reports, an inference of retaliation is raised. Mr. Glenn did meet the ERA 180 day filing requirement; so, this portion of the complaint does present a *prima facie* case under the ERA.

Finally, Mr. Glenn's July 24, 1997 external report of a fish kill possibly due to radioactive material and his August 1997 report of environmental concerns to the DOE Inspector General are protected activities. And, because the next amended complaint indicates Mr. Glenn may have been subjected to adverse personnel actions in September 1997, within a month or two of the protected activities (and the September 12, 1997 complaint is timely under all the statutes), he may be able to make a *prima facie* case regarding these two protected activity.[12]

Based on this analysis, the portion of the complaint seeking relief from adverse personnel action due to his complaint about security violations and public report about a loaded weapons is **DISMISSED** and the to Motion to Dismiss in regards to those two reports is **PARTIALLY GRANTED**. For the remaining portions of the complaint, the Motion to Dismiss is **DENIED**.

September 12, 1997 Amended Complaint

This complaint involved two disclosures by Mr. Glenn. First, Mr. Glenn's external

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disclosure of LMES e-mail correspondence concerning the suppression of information to the media does not appear to be an environmental protected activity since he did not specifically state in his complaint the e-mail "touched on" environmental issues. Second, Mr. Glenn's September 8, 1997 external report of a grey discharge into a nearby creek is a protected activity. LMES supervisors questioned him about the discharge and he was subsequently subjected to a hostile work environment that included an investigation into

to his observation of events at LMES' facilities.[13] I believe these facts set out a potential *prima facie* case.

The portion of the complaint seeking relief from adverse personnel action due to his LMES e-mail disclosure is **DISMISSED** and the to Motion to Dismiss in regards to this report is **PARTIALLY GRANTED**. In regards to the grey discharge report, the Motion to Dismiss is **DENIED**.

May 27, 1998 Final Complaint

Although I do not believe Mr. Glenn's early February 1998 report of security vulnerabilities was a protected activity, the other actions Mr. Glenn took that month including a report of retaliation and two environmental reports about discharges into a creek were protected actions. However, because Mr. Glenn did not file his complaint within thirty days of his termination of employment, February 27, 1998, his complaint about termination is untimely under all the environmental protection statutes except the ERA. As a result, Mr. Glenn by filing an untimely complaint is not entitled to relief concerning his termination of employment under the CAA, CERCLA, SWDA, TSCA, SDWA, and WPC. As a result, the portion of the complaint seeking relief from his employment termination under these environmental employee protection statutes is **DISMISSED** and the Motion to Dismiss is **PARTIALLY GRANTED**.

Mr. Glenn did meet the time filing requirements under the ERA, at the same time, this particular complaint did not involve any protective activities under the ERA since Mr. Glenn didn't specify in the complaint whether the retaliations were for protected activities under ERA. If the May 27, 1998 complaint had been the only one in this case, then the ERA would not apply and the entire complaint would be dismissed. However, as I have previously determined, Mr. Glenn's August 14, 1997 complaint about retaliation for his protected activities concerning the transportation of radioactive material and his report of environmental concerns to the DOE Inspector General does set out a *prima facie* case under the ERA. Because Mr. Glenn was discharged less than nine months after those protected activities and he was subjected to adverse personnel actions from July 1997 through February 1998, I believe an inference of retaliatory motive may be raised concerning the termination of his employment by LMES. Consequently, the Motion to Dismiss the complaint as it seeks relief under the ERA is **DENIED**.

IV. SUMMARY DECISION

After my determinations concerning the respondent's Motion to Dismiss for failure

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to state a claim, there are three potentially viable whistleblower claims that remain. The claims are:

(1) Violation of the ERA employee protection provisions based on LMES' adverse actions against Mr. Glenn from June 1997 through, and including, his employment termination on February 27 1998 due to his protected activity of reporting violations relating to the transportation of radioactive material.
(2) Violation of the CAA, CERCLA, SWDA, TSCA. SDWA, and WPC employee protection provisions based on LMES' adverse actions against Mr. Glenn in September 1997, and a violation of the ERA statute based on subsequent adverse actions, including his February 27, 1998 termination from employment for his protected activities of reporting a fish kill in July 1997 and reporting environmental concerns to the DOE Inspector General.
(3) Violation of the CAA, CERCLA, SWDA, TSCA, SDWA, and WPC employee protection provisions based on LMES' adverse actions against Mr. Glenn in September 1997 for his protected activity of reporting a grey discharge into a creek.

In determining whether a summary decision is appropriate, I am guided by the principles set out in the regulations, 29 C.F.R. §§ 18.40 and 18.41, as interpreted by the Administrative Review Board ("ARB"). Under the regulations, the ARB applies the standards established by the United States Supreme Court in the cases, *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[14] If a motion for a summary decision is supported by affidavits, the other party may not rest upon mere allegations or denials. Instead, the party opposing the motion must present specific facts that show there is a genuine issue of fact for a hearing. To defeat a properly supported Motion for Summary Decision, the opposing party must present affirmative evidence. If that party fails to make a showing sufficient to establish the existence of an element essential to his or her case and the party bears the burden of proof, then there is no genuine issue of material fact and the Motion for Summary Decision should be granted.

In its Motion for Summary Decision, the respondent asserts that all the adverse personnel actions LMES initiated against Mr. Glenn were motived by legitimate, nondiscriminatory motives. Through affidavits, declarations, and related documents, the respondent sets out an employment history of Mr. Floyd Glenn and the basis for its assertions. Since the first protected activity in the three potentially viable whistleblower claims mentioned above occurred in June 1997, I will focus on the personnel actions taken by LMES against Mr. Glenn from June 1997 through February 27, 1998, as presented in the respondents' affidavits, declarations, and appendix.

June 1997

After Mr. Glenn's June 1997 report of violations involving the shipment of radioactive material by two trucks, Mr. J. Woods conducted an investigation in August 1997 into the two trucking

incidents which included an interview with Mr. Glenn (Appendix, pages 300011 to 300130).[15] After a review by safety and radiological control experts, Mr. Woods concluded there was no hazard associated with the two shipments (Appendix, page 30020). The trucks and their drivers had complied with appropriate regulations. Mr. Woods did find some confusion arose because of unclear instructions in the security officer instructions. However, he also determined that Mr. Glenn had an inability "interface and communicate with people." (Appendix, page 300020). In addition, Mr. Glenn "did not understand or properly implement the stop work order." In his recommendations, Mr. Woods included clarification of the security officer instructions and recommended people skills training for Mr. Glenn. Other than Mr. Woods' investigation and recommendations, there were no other adverse actions associated with the truck incident.

In the month of June 1997, Mr. Glenn's duty performance lead to at least four complaints of inappropriate conduct (Appendix, pages 1023 to 1025, 1531, 1860 to 1862). Following his review of Mr. Glenn's job performance, Mr. Brandon gave Mr. Glenn an oral reminder for his inappropriate conduct in treating employees on June 25, 1997 (Appendix, page 1855).

July 1997

In early July 1997, an employee reported that Mr. Glenn made a comment in the break room that was offensive and racially inappropriate (Appendix, pages 2127 to 2132). The individual investigating the event, confirmed the statement had been made. Although Mr. Glenn did not mean to offend anyone, the investigator concluded the statement was inappropriate and offended to several employees (Appendix, page 2032).

Concerning the late July 1997 fish kill, Mr. Glenn did not report the problem to LMES. Instead, he made external reports to numerous parties including DOE. In response to his fish kill complaint, DOE personnel investigated the situation, interviewed the individual who made the fish kill report, and eventually issued a report of the investigation to LMES (Appendix, pages 2135 to 2141). The report stated an LMES employee had reported there had been a fish kill after a flood at the end of July 1997 due to PCB or radioactive material (Appendix, page 2136). However, the DOE report does not identify the complainant.[16] The record does not show LMES was aware Mr. Glenn made this report and thus there was no adverse action associated with that activity.

August 1997

Following another security incident between Mr. Glenn and LMES employees, and in due to the racial remark incident in July 1997, Mr. Brandon concluded the next disciplinary step of probation, or Decision Making Leave ("DML"), was appropriate (Appendix, pages, 1773 to 1784, and 1857 to 1858). Mr. Brandon issued the written DML letter on August 13, 1997 (Appendix, page 1859). The document placed Mr. Glenn on twelve month probation and stressed the importance of Mr. Glenn following all

company rules during the probation period. The DML indicated failure to comply with company procedures could lead to termination of his employment.

[Page 17]

Other than the above mentioned DOE report about the fish kill, the record does not contain any documents concerning Mr. Glenn's assertion that he discussed environmental concerns with DOE in August 1997. The DOE report does address numerous environmental allegations presented during the interview with an LMES employee. If this is the meeting Mr. Glenn is referring to, there were no subsequent personnel actions in response because LMES was not informed who had made the environmental complaints.[17]

September 1997

Shortly after Mr. Glenn's September 8, 1997 report to the Tennessee Department of Environmental Compliance ("TDEC") of a grey sludge discharge into a creek, the state agency notified LMES of the potential problem and LMES took corrective action to clean up the discharge (Appendix, pages 1734 and 1735). In its notification to LMES, TDEC indicated the informant was Mr. Glenn. As part of its corrective action concerning the discharge, LMES initiated a review into Mr. Glenn's failure to also report the discharge to LMES supervisors (Appendix, pages 1734 and 1735). The report noted Mr. Glenn had not complied with LMES written and posted procedures. These procedures notably require employees to report any incidents, including the release of hazardous substance, first to their supervisors (Appendix, pages 2162 to 2163, 2168 to 2169, and 2212). These instructions also state other reports may be made to outside agencies such as the DOE Inspector General and the FBI. Finally, the written procedures even provide access to "hot lines" if an employee is concerned about confidentiality. In sworn testimony in another proceeding, Mr. Clements stated the investigation into Mr. Glenn's failure to report the spill directly to LMES, and the subsequent personnel action concerning that failure (see below), were not in retaliation for Mr. Glenn reporting the discharge to TDEC.[18] Instead, Mr. Clements responded to Mr. Glenn's failure to follow LMES procedures which delayed the company's response to the spill.

Also in September 1997, Mr. Glenn continued to generate complaints about the performance of his duties (Appendix, pages 1744, 1750 to 1757, and 1765 to 1766).

October 1997

Mr. Clements explained that Mr. Glenn was placed on a twelve month probation in August 1997 through the use of Decision Making Leave ("DML"), due to fifteen incidents of inappropriate duty performance within three months (Declaration, para. 5). Because Mr. Glenn was already on DML or probation, when the September 1997 incidents occurred, he was subject to termination. However, Mr. Clements decided to give Mr. Glenn one more opportunity. On October 16, 1997, Mr. Clements presented Mr.

Glenn with a "Last Chance Conditions of Continued Employment" letter (Appendix, pages 2293 and 2426). The letter contained a summary of prior disciplinary actions, noted the initiation of probation in August 1997 and the occurrence of several more incidents of failure to follow instructions or orders since the start of the probation period, including the failure to follow LMES procedures in making an internal report of the grey sludge discharge, the use of improper vehicles entry procedures, and lack of good judgment in enforcing the seat belt policy. The letter

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stated it was a final warning and that continued disregard to instructions and procedures would lead to termination of his employment.

December 1997

Mr. Brandon counseled Mr. Glenn about the necessity for following verbal orders following an incident involving the relieving a guard post (Appendix, pages 2366 to 2369)

January and February 1998

In January and February 1998, Mr. Glenn's performance as a guard generated numerous complaints from LMES employees (Appendix, pages 2556 to 2557, and 2561 to 2562). In particular, Mr. Glenn refused to consider several reasonable explanations why seat belts were not in place at the moment he observed the occupants. For example, on January 30, 1998, Mr. Glenn issued a seat belt violation to a passenger in a vehicle. However, the vehicle was stopped at the time and it was established that the passenger had just entered the vehicle after it had stopped (Appendix, pages 2360 to 2365). An investigation into another seat belt enforcement complaint, which included a re-enactment of the incident, lead to the conclusion that Mr. Glenn's version of the incident were inaccurate (Appendix, pages 2558 to 2559).

During a February 1, 1998 meeting with a DOE assessment team, Mr. Glenn gave them a journal describing numerous alleged deficiencies of other LMES guards. DOE in turn passed Mr. Glenn's concerns on to Mr. Gibb (Declaration, para. 6), who in turn gave the information to Mr. Brandon (Declaration, para. 4). In effort to obtain further information about the guard deficiencies in order to take corrective action, Mr. Brandon conducted an interview with Mr. Glenn (Declaration, para. 5). Mr. Clements was <u>not</u> aware of Mr. Glenn's report to DOE until Mr. Glenn included the incident in his May 1998 complaint (Declaration, para. 9).

Concerning Mr. Glenn's February 1997 declaration for another whistleblower LMES employee, Mr. Brandon states he found a copy of the document in a box on his office door and gave it to Mr. Gibbs (Declaration, para. 7). Mr. Gibbs kept the document and, other than telling Mr. Hunter he had possession of the document, Mr. Gibbs did not

inform anyone about Mr. Glenn's written statements (Declaration, para. 7). Mr. Clements did not know Mr. Glenn had prepared the declaration until he read about it in the May 1998 complaint (Declaration, para. 10).

In mid-February 1998, Mr. Glenn took two days off to attend, with his children, the funeral of his ex-wife's grandmother. Mr. Glenn received two days paid funeral leave for this time. However, LMES regulations permitted paid funeral leave only for immediate family members. When Mr. Miner learned about the relationship of the deceased to Mr. Glenn, he informed Mr. Clements and they met with him on February 27, 1998 to discuss the incident (Declaration, para. 2 and Appendix, pages 2531 to 2535). According to Mr. Glenn, he told a union representative, Mr. Davis, he needed the time off and indicated the relative was his ex-wife's grandmother. When a supervisor indicated he would take care of the time off, Mr. Glenn believed he was authorized to attend the funeral. However, Mr. Glenn did not tell the supervisor his relationship to the deceased. Mr. Glenn stated he had just received his pay notice which included two days funeral leave. He had some doubts about paid funeral leave and planned to look into the issue. After Mr. Glenn's statements, the interview was stopped and Mr. Miner contacted Mr. Davis. Mr. Davis told Mr. Miner that Mr. Glenn did not tell him the deceased was his ex-wife's grandmother (Declaration, para.3). When Mr. Clements was told Mr. Davis did not support Mr. Glenn's account of the circumstances surrounding the funeral leave, he decided to terminate Mr. Glenn's employment because Mr. Glenn failed to follow proper procedures in requesting the funeral leave, failed to indicate the correct relationship of the deceased, and continued to have problems with the proper performance of his duties as a guard even while on probation (Declaration, para. 7). When the meeting reconvened, Mr. Clements informed Mr. Glenn that he was being terminated because of two incidents at the end of January 1998 of harassing employees as a guard and for his dishonesty in misrepresenting the facts concerning the funeral leave (Appendix, page 2535).

Discussion

In a whistleblower case, if the respondent comes forward with legitimate, non-discriminatory reasons for its adverse personnel actions, then the complainant has the ultimate burden of persuasion to show either discrimination against him for protected activity was the most likely motive or that the respondent's stated purposes are not credible. In this case, LMES has met its burden of production through affidavits, declarations, and supporting documents. The evidence presented by LMES shows a graduated, stepped disciplinary approach to Mr. Glenn's problems with following proper procedures and instructions. Based on the respondent's affidavits, declarations, and appendix, I find LMES has established legitimate business reasons for the various adverse personnel actions and eventual termination of Mr. Glenn's employment with LMES.

Mr. Glenn bears the ultimate burden of proof on the material fact of the motives behind LMES' adverse actions. To establish the fourth essential element of a whistleblower claim, Mr. Glenn has to prove LMES discriminated against him due to his protected activities. However, in response to LMES' presentation of legitimate business motives for

its actions, Mr. Glenn has failed to provide any affidavit, declaration, or document. The record contains no contrary evidence presented by Mr. Glenn to show that LMES' real motive was discrimination due to his protected activities or that the stated LMES' motives are not credible. Instead, the only demonstrated motives were related to Mr. Glenn's duty performance and failure to follow appropriate procedures. As a result, Mr. Glenn has failed to place into dispute the material fact of LMES' motives in its treatment of Mr. Glenn. The record shows no genuine issue concerning this material fact related to Mr. Glenn's ultimate burden of proof. Accordingly, Mr. Glenn's complaints of retaliation for environmental protected activities must be **DISMISSED.** The Motion for Summary Decision is **GRANTED**.

RECOMMENDED ORDER

1. The Motion to Dismiss the May 13, 1997 complaint for failure to state a claim is **GRANTED** and the complaint is **DISMISSED**.
2. The Motion to Dismiss the August 14, 1997, September 12, 1997, and May 28, 1998 complaints for failure to state a claim is **PARTIALLY GRANTED**. The Motion for Summary Decision on the August 14, 1997, September 12, 1997, and May 28, 1998 complaints due to the absence of a genuine dispute relating to the material fact of LMES' motives in its actions against Mr. Glenn is **GRANTED**. The complaints are **DISMISSED**.

ORDER

The hearing in this case scheduled for July 27, 1999 is **CANCELED.**

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, DC

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§§§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).